

MINUTES

MONTANA SENATE 58th LEGISLATURE - REGULAR SESSION

COMMITTEE ON JUDICIARY

Call to Order: By **CHAIRMAN DUANE GRIMES**, on February 25, 2003 at 8 A.M., in Room 303 Capitol.

ROLL CALL

Members Present:

Sen. Duane Grimes, Chairman (R)
Sen. Dan McGee, Vice Chairman (R)
Sen. Brent R. Cromley (D)
Sen. Aubyn Curtiss (R)
Sen. Jeff Mangan (D)
Sen. Jerry O'Neil (R)
Sen. Gerald Pease (D)
Sen. Gary L. Perry (R)
Sen. Mike Wheat (D)

Members Excused: None.

Members Absent: None.

Staff Present: Judy Keintz, Committee Secretary
Valencia Lane, Legislative Branch

Please Note. These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:

Hearing & Date Posted:

Executive Action: SB 18, SB 362, SB 447, SB 356, SB
265, SB 147, SB 394

EXECUTIVE ACTION ON SB 18

Discussion:

CHAIRMAN DUANE GRIMES explained there were several language changes which may not be considered by the subcommittee if SB 18 was not re-referred to the subcommittee or passed out of this Committee.

Beth McLaughlin, Montana Supreme Court, stated the language in question includes clean up language from the state assumption bill. Section 1, page 4, clarifies expenses related to Youth Court. In particular, this includes costs related to counsel appointed for the youth, transcript fees, witness fees, and expenses of the guardian ad litem. Currently the sections are contained in several different areas of the code and should be placed in the state-assumption portion of the statute, 3-5-901. On page 5, lines 1-2, the language clarifies that the state district court program is responsible for the cost of indigent defense in involuntary commitment cases. The current language appears to make the county responsible for payment of indigent defense in involuntary commitment cases. Section 3 addresses involuntary commitment issues. This clarifies that transportation to a mental health facility and the cost of the professional person testifying, are county assumed expenses and not state district court expenses.

SEN. JEFF MANGAN suggested SB 18 be referred to the Senate Finance and Claims Committee. The first issues could be addressed in SB 18 and the third issue could be addressed in SB 134. It is important the subcommittee review these matters.

Motion/Vote: **SEN. DAN MCGEE** moved that **SB 18 BE TAKEN OFF THE TABLE**. Motion carried unanimously.

Motion/Vote: **SEN. MCGEE** moved that **SB 18 DO PASS**. Motion carried unanimously.

EXECUTIVE ACTION ON SB 362

CHAIRMAN DUANE GRIMES stated that informal changes had been made to SB 362 to incorporate the changes discussed during executive action on the bill the previous day, **EXHIBIT(jus42a01)**. Persons 18 to 21 years of age had been excluded from the bill.

Motion: **SEN. MCGEE** moved that **SB 362 DO PASS**.

Substitute Motion: **SEN. BRENT CROMLEY** moved that **SB 362 BE AMENDED**, SB036201.avl, **EXHIBIT(jus42a02)**.

Discussion:

CHAIRMAN GRIMES noted the amendment would provide for the confiscation of licenses. If the person failed the community-based substance abuse course, a longer confiscation period would apply. On page 4, a change would be made so that treatment records would be kept at the Department of Public Health and Human Services (DPHHS).

SEN. MCGEE stated there was a possibility that juvenile probation officers could be reassigned to the Department of Corrections (DOC). If this occurred, the above change would be problematic.

CHAIRMAN GRIMES explained current practice is for the records to be kept at the DPHHS and the probation officers work for the Department of Justice (DOJ).

SEN. MANGAN noted very few juvenile probation officers dealt with status offenders.

Vote: Motion carried unanimously.

CHAIRMAN GRIMES added that Mothers Against Drunk Driving (MADD) asked for increased penalties to remain in the bill. On page 2 of the bill, the penalties were lowered to \$150 and on page 3, the penalties were lowered to \$300. He requested the penalties be changed to \$200 and \$500, respectively.

Substitute Motion: SEN. MCGEE moved that SB 362 BE AMENDED.

Discussion:

SEN. MCGEE explained his amendment would increase the penalties as set out by **CHAIRMAN GRIMES**. **Ms. Lane** added the changes would be made on page 2, line 28; and page 3, (b) and line 4.

Vote: Motion carried 8-1 with Cromley voting no.

Motion: SEN. MCGEE moved that SB 362 DO PASS AS AMENDED.

Discussion:

SEN. MANGAN raised a concern regarding the issue of an additional 60 days of confiscation if the youth participated in the program but the parent did not. **Ms. Lane** explained the language was contained on page 2, lines 23-25 and this would not be discretionary.

Ms. Lane summarized the language would need to state that if the parent refused to complete the program, the court would have the discretion to add the additional penalty.

CHAIRMAN GRIMES stated the language would order the parents to complete the program. The language on page 2, line 23, stated the additional confiscation would occur only if the convicted person failed to complete the community-based substance abuse course.

Vote: Motion carried 8-1 with Cromley voting no.

EXECUTIVE ACTION ON SB 447

Motion: SEN. MCGEE moved that SB 447 DO PASS.

Discussion:

CHAIRMAN GRIMES explained page 1, lines 1-2, included an absolute privilege and line 22 contained a qualified privilege. Information about a person's job performance could be provided in one of two ways: (c) with the consent of the person or (d) if no consent from the person is realized. In the past, the most controversial method or providing reference checks has been the blacklisting statutes which were set out on page 3.

Substitute Motion: SEN. CROMLEY moved that SB 447 BE AMENDED.

Discussion:

SEN. CROMLEY explained he would delete the new language found on line 5, line 14 and line 15 of page 2. This matter may not come up for 30 days or until the employee applied for other employment. The language dealing with consequences of failing to provide the statement would force the person to seek an attorney to handle the claim. Most employees would not be aware of this matter. Also on page 1, line 20, he would strike the language "or has reason to know that it may be defamatory."

CHAIRMAN GRIMES raised a concern in regard to the change on page 1. An employee could agree to a reference check knowing it will be negative and then file a lawsuit as a result of the action.

SEN. CROMLEY agreed this could be the case and his motion would then only involve the language in regard to 30 days.

{Tape: 1; Side: B}

SEN. O'NEIL asked why the 30 day notice would make a difference. The employer could answer requests for information on the terminated employee until the employee requested a statement explaining why he or she had been laid off.

CHAIRMAN GRIMES explained when an employer published information regarding job performance it would be an absolute privilege with the consent of the person under (c) or it would be a communication under (d) made without malice.

SEN. GARY PERRY questioned whether the language was clear. It is important that the language not be construed to state if the employee hadn't requested or written for explanation of discharge within 30 days, the employer could then state anything he or she believed to be the case.

CHAIRMAN GRIMES clarified the time frame of 30 days only dealt with the employee making a request for a written explanation of his or her discharge.

Ms. Lane clarified the amendment would include the language on page 2, line 5.

Vote: Motion failed 1-8 with Cromley voting aye.

SEN. MIKE WHEAT maintained the simplest way to handle this matter would be to require the employer to give a written notification of the reasons for termination. If the employee objected, this could be noted. The employer and employee would both know the exact reasons for termination.

CHAIRMAN GRIMES raised a concern that some employers would not know this was expected of them. Also, the information may be provided in an unknowledgeable fashion, which would expose the employer to more risk.

SEN. MCGEE summarized lines 28-30 addressed a publication. This would be a privileged publication, if it was made in accordance with (1). Subsection (1) would include the consent of the person alleged to have been defamed. The language does not clarify that the issue involves libel or slander actions. He maintained an employer would find the language very confusing.

SEN. PERRY did not like the language used in (c). He maintained it was misleading language.

Ms. Lane stated two different areas of law had been combined in the bill. If someone was fired, they may sue for wrongful discharge. This is totally unrelated to a defamation suit. The

purpose of including 27-1-804 is simply to address the possible claims from defamation once a former employer provided information regarding a former employee. Section 1 of the bill only addresses those types of instances where the employer might be sued by a former employee for defamation because something was said to a prospective employer. Subsection (c) on page 1 is an attempt to place into statute what is recognized in common law as an absolute defense. Technically, this is totally unrelated to employment law. It has been combined in this bill and this has made the bill extremely complicated and difficult to comprehend.

Vote: Motion carried 5-4 on a roll call vote.

EXECUTIVE ACTION ON SB 356

Motion: SEN. PERRY moved that SB 356 DO PASS.

Discussion:

CHAIRMAN GRIMES explained all the language following the word "that" on line 25 was being stricken from the bill. This will allow for cities, towns, or counties to adopt ordinances or resolutions that do not require affront or alarm as an element of the offense of indecent exposure.

{Tape: 2; Side: A}

SEN. CROMLEY questioned why the crime did not include an affront. **CHAIRMAN GRIMES** remarked that since strip clubs have signs stating that the establishment is in fact a strip club, there was no way to prove affront or alarm. An ordinance against nude dancing could not be passed under this section because it would not cause affront or alarm.

SEN. JERRY O'NEIL raised a concern that ballets and legitimate stage productions have some flexibility in regard to costumes. **CHAIRMAN GRIMES** claimed the constitutional protections would apply. This bill would allow a measure of local control in areas that do not have any at this time. People in his community have acted in a very offensive and unprofessional manner. This law will establish and reaffirm the rights of the people who do not want their children exposed to unhealthy situations.

SEN. MANGAN remarked that the amendment would make it necessary for the citizens to walk into the establishment and to actually see the stripper. They would then need to call law enforcement about the indecent exposure matter. The current indecent exposure law will work in the instance of someone stripping outside the club.

SEN. CROMLEY disagreed. He further noted that society views things that do cause alarm or affront as crimes. He did not believe something could be called a crime that did not cause an affront or alarm.

SEN. WHEAT added that this legislation would give rise to lawsuits.

CHAIRMAN GRIMES remarked that as a result of this legislation, the signs and silhouettes have been removed from the establishment near Three Forks. There has been a letter of apology from the owner. People understand that a line has been crossed that they did not know existed. This involves one person's rights versus another person's rights. Those rights have been violated in his community.

Substitute Motion/Vote: **SEN. PERRY** moved that SB 356 BE AMENDED, SB035603.av1, **EXHIBIT(jus42a03)**. Motion failed 4-5 on roll call vote.

Substitute Motion/Vote: **SEN. WHEAT** moved that SB 356 BE INDEFINITELY POSTPONED. Motion carried 5-4 on roll call vote.

EXECUTIVE ACTION ON SB 265

Motion: **SEN. MCGEE** moved that SB 265 DO PASS.

Discussion:

CHAIRMAN GRIMES remarked a great deal of crime is associated within the area around strip clubs. One way to address this problem is to make sure the activities in the establishment do not violate public health and safety standards. Young ladies are being abused. This leads to domestic abuse, violence against women, and sex crimes. He reviewed a grey bill on SB 265, **EXHIBIT(jus42a04)**. Section 1 would establish a ten foot zone wherein the dancers would need to be separated from the patrons and the stage would be at least two feet from the floor. The language regarding regular performers had been stricken. This bill addresses nudity and a separation zone. Subsection (c) separates the beverage license from the strip club operation. Due to the concerns in the hearing, juice bars have also been included.

{Tape: 2; Side: B}

SEN. MANGAN noted the term "semi-nude" was added. He questioned the definition of the term. **CHAIRMAN GRIMES** remarked this term could be removed from the bill.

Ms. Lane claimed that by including premises that do not sell alcohol, the bill may have constitutional problems. This would address expression and freedom of speech. It is constitutional to prohibit nudity in establishments licensed to sell alcohol because the state has an interest in public safety and welfare. Through the alcoholic beverage license, the state has this leverage on businesses. The Billings ordinance was specific as to premises licensed to sell alcohol. Once this prohibition is extended to businesses that do not sell alcohol, this legislation would be open to constitutional challenges.

SEN. GRIMES stated he would strike all references to establishments that sold non-alcoholic beverages. He also changed "ten" feet to "three" feet in Section 1. He summarized his amendment would address the following: establishments licensed to sell alcohol; a three foot separation between the patron and the entertainer; the stage would be two feet from the floor; and persons in a state of nudity would not solicit orders for alcoholic beverages. He further added the purpose for section 2 was to define nudity and establish the fine.

SEN. O'NEIL noted this involved legislating morality.

SEN. PERRY suggested section 1, line 3, state "a person who appears nude on the premises of". **SEN. GRIMES** agreed to the change.

SEN. WHEAT remarked that he had read the Ravalli County case and the Erie case. Erie is based upon secondary impacts to include crime associated with these establishments. We do not have a record which establishes there are secondary impacts caused by these establishments. This is the only way to address the constitutional implications.

SEN. AUBYN CURTISS questioned whether this language was much more restrictive than the Billings ordinance. **CHAIRMAN GRIMES** explained the original bill was the Billings ordinance verbatim, with codification changes.

SEN. CROMLEY remarked that he authored the Billings ordinance approximately 30 years ago. It was based upon health conditions and patterned after California code.

SEN. GRIMES explained it would be more restrictive in regard to the three foot separation matter.

Motion/Vote: SEN. MCGEE moved that SB 265 BE AMENDED. Motion carried 8-1 with MANGAN voting no.

Motion/Vote: SEN. MCGEE moved that SB 265 DO PASS AS AMENDED. Motion failed 4-5 on roll call vote.

Motion/Vote: SEN. WHEAT moved that SB 265 BE INDEFINITELY POSTPONED AND THE VOTE REVERSED. Motion carried 5-4.

EXECUTIVE ACTION ON SB 147

Motion: SEN. MCGEE moved that SB 147 be taken off the table.

Discussion:

SEN. MCGEE explained that he, SEN. CROMLEY, and SEN. PERRY met in subcommittee and decided to table the bill. He further noted that SEN. THOMAS had suggested having the southwest area of Montana revert back to its current condition. The only change would be that one judge would be removed from the northeast part of the state and moved to Yellowstone County.

SEN. WHEAT raised a concern in regard to Judge McCarter's testimony. As Chairperson of the Montana Judges Association, she maintained more input was needed from the district court judges.

SEN. MANGAN noted it was important the judiciary have input in regard to this matter.

SEN. CURTISS was not in support of the bill. The people in Yellowstone County considered this to be an unfunded mandate.

SEN. MCGEE withdrew his motion.

EXECUTIVE ACTION ON SB 394

Motion: SEN. PERRY moved that the Committee reconsider its action on SB 394.

Discussion:

SEN. PERRY stated there had been further input to the subject of the bill. A well respected attorney called this a "loser pay" bill. That is the greatest deterrent against frivolous lawsuits. He added that Jon Sullivan had provided a statement which stated that in discrimination cases, the law allows the prevailing party

to be awarded attorney fees. The courts have given this the following interpretation: 1) If the employee wins, attorney fees will be awarded even if the recovery is small. An employee can win \$500 and receive \$10,000 of attorney fees. 2) If an employer wins, attorney fees are awarded only if plaintiff's case is groundless, frivolous, or utterly without merit. Most cases do not meet that standard. This theory could be applied to other cases as well.

SEN. PERRY remarked the trial lawyers were against the bill, the defense lawyers were against the bill, and the insurance company's lawyers were against the bill because settlement costs may rise. For once, insurance companies, businesses, and municipalities may decide to stand up for what is right. In another committee hearing, the general manager of a mine testified they spend hundreds of thousands of dollars a year defending themselves against lawsuits with no recourse if they win.

{Tape: 3; Side: A}

SEN. CROMLEY claimed the bill carried many unintended consequences. Attorney fees will only be collected if someone can afford to pay the fees.

SEN. PERRY stated the change would be for the better.

Vote: Motion carried 5-4 on roll call vote.

**Motion/Vote: SEN. PERRY moved that SB 394 DO PASS AS AMENDED.
Motion carried 5-4 on roll call vote.**

ADJOURNMENT

Adjournment: 10 A.M.

SEN. DUANE GRIMES, Chairman

JUDY KEINTZ, Secretary

DG/JK

EXHIBIT (jus42aad)